

Claimant argues her job duties aggravated a preexisting low back condition, and therefore, the accident of August 26, 2010, is compensable. Further, claimant contends the ALJ erred in her determination that claimant failed to meet her burden of proof by the preponderance of the evidence.

Respondent argues the Board has no jurisdiction to review this appeal under K.S.A. 44-534a(2), as the ALJ made a finding that no further medical treatment is necessary. Alternatively, respondent argues the credible evidence suggests any work-related injury suffered by claimant has long since resolved, and the ALJ's Order Denying Medical Treatment should be affirmed.

The sole issue for the Board's review is: Does the Board have jurisdiction to review claimant's appeal?

FINDINGS OF FACT

Claimant worked for respondent for three years as a bagger, filling and moving bags of fajita meat weighing between 8 and 10 pounds. Claimant performed this duty several times per hour. The position required claimant to twist and bend.

Claimant testified she was struck in the back with a gondola by a coworker on August 26, 2010,¹ injuring her low back. Claimant presented at respondent's nurse's station on August 30, 2010, where she was treated for back pain with ice, Biofreeze, and I-prin.

Claimant sought treatment with Dr. Aurora Arribas, her personal physician. In a note dated November 9, 2011, Dr. Arribas indicated an MRI of claimant's lumbosacral spine showed some hypertrophic changes on L4 and L5, and "apparently, it is aggravated by doing her job at work; doing a lot of bending and body twisting."² Dr. Arribas diagnosed claimant with degenerative joint disease of the lumbosacral spine and recommended she continue pain medication and rest at home. Dr. Arribas allowed claimant to return to work. On September 12, 2012, claimant indicated to Dr. Arribas she wanted to return to work and no longer had bilateral hip pain. Dr. Arribas noted claimant was "generally feeling better after she started on the Calcium [with vitamin] D supplement."³ Dr. Arribas provided claimant with a note allowing her to return to work at full capacity on September 17, 2012.

Dr. Pedro Murati, a board certified independent medical examiner, examined claimant at her counsel's request on December 10, 2012. Claimant presented with occasional numbness and tingling in the right foot; occasional sharp pains in the low back; low back pain going into the right leg; the inability to sit, stand, lie down, or lift heavy

¹ An Application for Hearing filed with the Division lists claimant's accident date as all days worked after August 26, 2010. Claimant originally testified during deposition her accident occurred in December 2010. She later testified at the December 11, 2013, preliminary hearing to an accident date of August 26, 2010. Application for Hearing (filed Nov. 1, 2012); Claimant's Depo. at 10; P.H. Trans. (Dec. 11, 2013) at 5.

² P.H. Trans. (Dec. 11, 2013), Cl. Ex. 3 at 1.

³ P.H. Trans. (Dec. 11, 2013), Resp. Ex. 1 at 1.

objects without increased low back pain; and the inability to have sex due to low back pain. After reviewing claimant's available history, medical records, and performing a physical examination, Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy and right SI joint dysfunction. Dr. Murati recommended claimant undergo additional testing and additional treatment, including physical therapy and medication. He also imposed restrictions. Dr. Murati wrote, "This claimant's current diagnoses are within all reasonable medical probability a direct result from the work-related injury . . . during her employment with [respondent]." ⁴

Dr. David Hufford, an occupational and sports medicine physician, examined claimant for purposes of a court-ordered independent medical evaluation on June 18, 2013. Dr. Hufford reviewed claimant's available history, medical records, and performed a physical examination, determining claimant had a work-related low back contusion and right knee pain. Dr. Hufford opined claimant's low back pain was the result of chronic and degenerative lumbar spine disease and possibly osteopenia/osteoporosis. He further stated claimant appeared "to have experienced an acute injury which was treated to resolution as documented in the medical record." ⁵ Dr. Hufford determined claimant appeared to have significant preexisting degenerative osteoarthritis in the knee that is not related to any specific injury. Dr. Hufford recommended no work restrictions as related to a work injury.

In a follow-up report to the ALJ dated October 9, 2013, Dr. Hufford clarified his position:

I do not believe that [claimant's] work has caused the degenerative arthritic change in her lumbar spine or right knee. I do not believe that her work has accelerated or advanced her condition due to any acute injury or repetitive activity. I do not believe that her work through any acute injury or repetitive activity has aggravated her degenerative disc disease and facet arthropathy in the lumbar spine nor preexisting degenerative osteoarthritis in the right knee. I believe she had an acute myofascial tissue injury to the lumbar spine in 2009 and that this injury resolved to an asymptomatic level without impairment or residual symptoms based on documentation in the records provided. ⁶

Claimant worked for respondent with no restrictions until her last day on November 14, 2011. Claimant has not worked since November 14, 2011.

⁴ P.H. Trans. (Dec. 11, 2013), Cl. Ex. 1 at 3.

⁵ Hufford IME Report (June 18, 2013) at 2.

⁶ Hufford Report (Oct. 9, 2013) at 1.

PRINCIPLES OF LAW

K.S.A. 44-534a(a)(2) states:

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. **A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.** Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts. [Emphasis added.]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

⁷ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁸

ANALYSIS

1. Does the Board have jurisdiction to review claimant's appeal?

This Board Member has reviewed the appealed Order and does not find that the ALJ made a finding that claimant's low back injury does not arise out of and in the course of her employment with respondent. There is no mention of this issue in the Order. The only issue decided by the ALJ relates to medical treatment. The Board cannot review an issue that does not exist.

With regard to the ALJ's ruling on claimant's need for medical treatment, K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 2010 Supp. 44-551(i)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified therein.

The issue whether a worker is entitled to medical compensation is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.⁹ This Board Member finds that the ALJ has jurisdiction to determine if medical treatment is necessary for a compensable injury. Therefore, this issue is not one of which the Board takes jurisdiction in an appeal of a preliminary order.

CONCLUSION

The Board lacks jurisdiction to review this appeal.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that claimant's appeal is dismissed for lack of jurisdiction. The Order of Administrative Law Judge Pamela J. Fuller dated December 12, 2013, remains in full force and effect.

⁸ K.S.A. 2012 Supp. 44-555c(k).

⁹ K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge